

# Principles of Professional Responsibility for Appellate Attorneys

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# Key principles

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- The Duty of Competence
  - Rule 1.1, M.R.P.C.
  - Competence to Argue
  - Competence to Research and Brief
- *Anders v. California, 386 U.S. 738 (1967)*, and whether to appeal
  - Rule 1.3 vs.
  - Rule 3.1
- Ethical Duty of Candor to the appellate court
  - “paramount, even to the interests of the client”
  - Rule 3.3
- Conflicts of interest
  - Rule 1.7(b)
- Duty of decorum, demeanor and courtesy
- Duty to assist and improve the legal system
  - Duty to educate and train
- Duty to fairly state the record and the issues
  - Support factual assertions with references to the record



# The Duty of Competence

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- ❑ Rule 1.1, Montana Rules of Professional Conduct
- ❑ Competence to argue
- ❑ Competence to research and brief



# Rule 1.1: Montana Rules of Professional Conduct

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- “A lawyer shall provide competent representation to a client.”
- “Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for this representation.”

# Competence to Argue the Case

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- Know the substantive law of your case
  - From U.S. Supreme Court
  - From the Montana Supreme Court
  - But, from other jurisdictions as well
- Anticipate, and be familiar with, the State's legal arguments in opposition
- Understand how to deal with questions from the bench – especially where they may disrupt your organizational scheme

# Competence to research and brief

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- ❑ Know how to find the key issues
- ❑ Know how to construct an effective brief
- ❑ Know how, and when, to cite authority
- ❑ Know which authority to cite
- ❑ Get to the point !
- ❑ MRAP, Rule 23(a)(4): “The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes, and pages of the record relied on.”



# The Duty to Appeal (or not)

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- A potential for conflict?
  - Compare
    - Rule 1.3, M.R.P.C (duty of diligent representation)
- vs.
- Rule 3.1, M.R.P.C. (duty to present only meritorious claims to the court)



## Rule 1.3

# Montana Rules of Professional Conduct

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- “A lawyer shall act with reasonable diligence and promptness in representing a client.”





## Rule 3.1

# Montana Rules of Professional Conduct

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- “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.”

# The “Anders” issue

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“The constitutional requirement of substantial equality and fairness can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to *amicus curiae*.”

*Anders*, 386 U.S. at 744



# The Duty of Candor to the Court

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- ❑ Talk about a possible conflict!
- ❑ The duty of candor to the court is paramount, even to the interests of the client!
  - Rule 3.3, M.R.P.C.
- ❑ Likewise, there is a duty to disclose pending settlement (plea agreement)
- ❑ The duty to disclose is continuing in nature



## Rule 3.3

# Montana Rules of Professional Conduct

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- ❑ “A lawyer shall not knowingly . . . (b) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”
- ❑ “The duty stated in paragraph . . . (b) . . . apply even if compliance requires disclosure of information otherwise protected by Rule 1.6 [confidentiality of information].”

# Duty of Candor (continued)

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- ❑ A.B.A. Committee on Professional Ethics and Grievances has concluded that you must disclose precedent after answering these three questions:
  - Are the overlooked cases ones that the court clearly should take into account?
  - Would my failure to disclose the cases be viewed as a violation of the duty to disclose, as viewed in the eyes of the court?
  - Would the court conclude that it had been misled by my failure to disclose?

# Conflicts of interest

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- ❑ Be constantly alert for possible conflicts of interest
  - You are not insulated just because you are an appellate, rather than trial, attorney
- ❑ See, Rule 1.7(b), M.R.P.C.

# Duty of decorum, demeanor, and professional courtesy

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- ❑ You can be sanctioned for disparaging the trial court
  - Counsel stated on the record: “this court has either ignored the law or is not interested in determining it.”
  - Florida appellate court held him in contempt, advising: “You can think it, but you better not say it.”
  - *Vandenbergh v. Poole*, 163 So. 2d 51 (Fla 1964)
- ❑ You have a duty to be courteous to opposing lawyers
  - Counsel stated in his brief: “[defense counsel] is “a horse’s rear end.”
  - Montana Supreme Court remanded for contempt hearing
  - *Malee v. District Court*, 275 Mont 72 (1995)

# Duty to assist and improve the legal system

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- Seek out effective training programs
  - And volunteer to provide input if your experience so dictates
- Assist and educate other lawyers
- Be a good colleague
- Make regular suggestions to improve the quality of appellate practice, procedure, and advocacy
- Educate your client as to the rules and procedures that apply to appellate matters





# Duty to fairly state the record and the issues

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- Don't cite quotes out of context
- Support factual assertions with reference to the record